STATE OF MICHIGAN

COURT OF APPEALS

CHERYL WARREN,

Plaintiff-Appellant,

v

HIGHLAND LAKES CONDO ASSOCIATION, STEVEN A. LONE, JON SABO, JEFFREY VOLLMER, SHANE E. DIEHL, WAYNE G. WEGNER, and WEGNER & ASSOCIATES, PC,

Defendant-Appellees.

UNPUBLISHED
February 7, 2008

No. 272061
Wayne Circuit Court
LC No. 05-534209-CH

HIGHLAND LAKES CONDOMINIUM ASSOCIATION,

Plaintiff/Counter-Defendant-Appellee,

v

CHERYL M. WARREN,

Defendant/Counter-Plaintiff-Appellant,

and

COMERICA BANK,

Defendant.

No. 274861
Wayne Circuit Court
LC No. 06-610275-CH

HIGHLAND LAKES CONDO ASSOCIATION,

Plaintiff/Counter-Defendant-Appellant,

v

No. 275034

Wayne Circuit Court
LC No. 06-610275-CH

CHERYL M. WARREN,

Defendant/Counter-Plaintiff-Appellee,

and

COMERICA BANK,

Defendant.

Before: Schuette, P.J., and Borrello and Gleicher, JJ.

PER CURIAM.

In this consolidated appeal, plaintiff Warren appeals as of right the trial court's June 16, 2006 order granting summary disposition to defendants under MCR 2.116(C)(10). In addition, defendant/counter-plaintiff Warren appeals as of right the trial court's November 3, 2006 order granting summary disposition on plaintiff/counter-defendant Highland Lakes Condominium Association's (Association) foreclosure action under MCR 2.116(C)(10) and the trial court's November 3, 2006 order granting summary dismissal of Warren's counter-claims under MCR 2.116(C)(7). Further, plaintiff/counter-defendant Association appeals as of right the trial court's November 17, 2006 order awarding partial attorney fees. We affirm.

I. FACTS

Warren purchased unit 52 (property) in the Highland Lakes Condominiums (HLC). The HLC condominium bylaws (bylaws) require every unit owner to pay monthly assessments to the Association. Warren established a monthly automatic payment by check system to pay her dues.

In October 2003, the Association's monthly assessments were increased. Warren failed to update her electronic payment system to reflect the higher payment. As a result, she did not pay the full amount that was due. Warren never made up the difference; so she began to accrue late fees, which also went unpaid.

On May 27, 2005, Warren's bank issued a check to the Association for payment of her monthly assessment on a closed account; the check was returned unpaid. On June 7, 2005, the Association's counsel, Wegner & Associates (Wegner), sent a letter to Warren about the arrearage and indicated that legal fees would be assessed on her account because legal counsel was involved in the collection effort; it also stated that legal action would be commenced if she did not pay her account in full by June 17, 2005.

Art. II, § 6 of the bylaws, and MCL 559.208, authorize the Association to enforce collection of delinquent assessments by foreclosure of a statutory lien that secures payment of the assessments. The bylaws also provide that expenses incurred in collecting unpaid

assessments, including actual attorney fees, are chargeable and may be secured by a lien on the property.

On July 27, 2005, Warren's bank issued another check for her monthly assessments on the same closed account, with the same result as above. John Sabo, on behalf of the Association, filed a police report concerning the returned checks with the Northville Township Police Department.

On August 5, 2005, under Art. II, § 6 of the bylaws, a lien was recorded against Warren's property. Wegner sent a letter to Warren notifying her of the lien against her property and threatening foreclosure if the unpaid assessments were not paid within 10 days. On August 18, 2005, in response to the police report, Warren paid $1,114.43 to the Association. However, the total arrearage was $1,675.25, excluding the legal fees already incurred. The police investigation was dropped, but Warren's account still had an outstanding balance and late fees continued to accrue.

Wegner sent another letter to Warren regarding her continued arrearage and informing her that the Association had, as allowed under the bylaws, Art. II, § 6, declared all remaining assessments for the current fiscal year due. The amount due was listed as $6,327.90, which did not include interest or attorney fees. The letter also said that the Association intended to foreclose on the lien.

On October 27, 2005, Wegner sent a letter to Warren demanding payment of the arrearage by November 22, 2005. The letter stated that if the arrearage was not paid, the Association would go forward with the public sale of her property. Notice of the impending foreclosure sale was posted at Warren's residence on November 1, 2005. After the notice was posted on her door, Warren began a series of phone calls and emails that threatened legal action against the Association, the Association's agents and officers, and Wegner.

On November 29, 2005, Warren filed a 162-paragraph, 6-count complaint in an effort to stop the foreclosure action. Defendants were named as follows: (1) the Association, (2) Wegner & Associates (and individually naming attorneys Jeffrey Vollmer, Shane F. Diehl, and Wayne G. Wegner), (3) Steve Lone, and (4) Jon Sabo (Sabo and Lone are agents of the Association). The complaint alleged breach of fiduciary duty, slander of title, abuse of process, violations of the Fair Housing Act and the Elliot-Larsen Civil Rights Act, and a request for an accounting of the Association's books and investments. The claims were asserted against all defendants (hereafter collectively referred to as Highland).

On December 1, 2005, Warren filed for Chapter 13 bankruptcy protection, which caused Highland to drop the foreclosure action. The United States Bankruptcy Court for the Eastern District of Michigan dismissed Warren's bankruptcy petition on January 13, 2006, because she failed to meet filing deadlines. On December 20, 2005, Highland filed its first set of interrogatories to plaintiff. Warren failed to respond within the statutory period. Highland filed a motion to compel answers to interrogatories on January 25, 2006; at a motion hearing on February 10, 2006, the trial court ordered Warren to answer Highland's interrogatories on or before February 17, 2006.

On February 24, 2006, Highland filed a motion for summary disposition and dismissal with prejudice due to Warren's failure to comply with the court rules and the trial court's order. On March 7, 2006, Highland served a second set of interrogatories, requests for production of documents, and requests for admissions. Highland attached 18 exhibits to the discovery requests to aid Warren in answering. The admissions were specifically directed to the allegations in Warren's complaint.

On March 29, 2006, Warren filed an answer to defendant's requests for admissions. Warren did not answer any of the requests for admissions—she refused to answer every paragraph. Warren's response to paragraph 1 objected to the propriety of the requests and gave three reasons as follows: (1) the request for admissions was a bad faith effort because Warren informed Highland that she would be dismissing the suit without prejudice; (2) the trial court lacked jurisdiction because, in light of the voluntary dismissal, the case was no longer a state-court matter due to the United States Department of Housing and Urban Development's involvement in the matter; and (3) the motion for protective order regarding oppression, undue burden, and expense because of confusion resulting from misleading representations by Mr. Taylor. Warren's response to paragraphs 2 through 54 stated, "Plaintiff repeats her response (objection) to paragraph 1."

Warren objected to paragraph 55 by stating that the question should be directed to other condominium co-owners and determined through appropriate discovery methods. She answered all remaining paragraphs by referencing her answer to either paragraph 1, paragraph 55, or both paragraph 1 and 55. Paragraph 69 asked Warren to admit that Highland had not violated the terms of any order or adjustment under MCL 37.2702. Warren objected to this paragraph because "it presupposes the existence of a prior Elliot-Larsen Civil Rights Act Violation against defendants" and she had not been give a copy of any order or adjustment. Paragraph 69 is a direct response to paragraph 152 of Warren's complaint, which states that Highland violated MCL 37.2702.

Highland moved the trial court to deem defendant's requests for admissions dated March 6, 2006, to be admitted or, alternatively, to compel amended answers to be served. Warren again responded to the motion by claiming that she was planning to voluntarily dismiss the case without prejudice. A hearing on the motion to deem requests admitted was held on April 7, 2006; Warren appeared with counsel and she and her counsel participated in oral argument on the motion. Highland argued that Warren refused to participate in discovery and failed to comply with the court rules and prior orders of the trial court; she had not complied with the order compelling answers to the first interrogatories and had failed to file answers to the second interrogatories that had been served on March 7, 2006. Highland further argued that Warren's objections to the requests to admit amounted to a refusal to answer—so the requests should be deemed admitted. Warren's counsel responded that Warren intended to dismiss the lawsuit without prejudice. Warren spoke on her own behalf, using the same argument as her counsel. The trial court observed that she had not dismissed the case. Warren explained that she withdrew her motion to dismiss before it was heard so she could write a brief regarding federal-court jurisdiction. The trial court granted Highland's request and deemed the admissions admitted.

On April 28, 2006, a hearing was held on Highland's motion to compel answers to the second set of interrogatories. The trial court issued an order compelling Warren to answer

Highland's discovery requests on or before May 29, 2006. A motion hearing on Warren's request for a protective order and on her motion to dismiss without prejudice was scheduled for May 05, 2006, but the hearing was adjourned at Warren's request.

On April 7, 2006, Highland sued to foreclose on the lien against Warren's property. On June 16, 2006, Warren filed an answer that included, as counter-claims, the claims that were raised in her previous suit. Warren also included a breach of contract claim, and a claim that Highland was in "violation of Michigan and Federal Fair Debt Collection practices." Warren later filed an amended answer to the complaint, and an amended counter-claim that essentially mirrored the June 16 filing. Highland answered the first counter-claim by asserting, among numerous other affirmative defenses, that the doctrine of res judicata applied. Highland answered the amended counter-claim by first noting that the document was filed in violation of MCR 2.118 and, second, that the doctrine of res judicata applied.

Warren missed a May 16, 2006 deadline for the filing of a witness list. On June 16, 2006, a motion hearing was held to consider Highland's two motions for summary disposition of Warren's 6-count complaint. The first motion, filed on April 20, 2006, sought summary disposition under MCR 2.116(C)(10) because the deemed admissions made it impossible for Warren to raise any genuine issue of material fact. The second motion, filed on May 22, 2006, sought summary dismissal with prejudice for Warren's failure to comply with discovery. The court granted Highland's (C)(10) motion for summary disposition, finding that, based on the deemed admissions, there was no genuine issue of fact in dispute, so summary disposition was proper; the trial court's decision to grant summary disposition precluded the necessity of considering the discovery-compliance motion. The trial court denied costs to both parties.

A motion hearing was held on October 27, 2006, and the trial court reiterated that there was no order for attorney's fees entered upon the June 16, 2006 summary disposition of Warren's claims. Warren repeatedly stated that the foreclosure issue was fully litigated in the earlier case. Highland stated that the only issues fully litigated at the June 16 hearing were Warren's claims and the issue of attorney's fees on the summary disposition of those claims. The court denied Warren's motion for an extended discovery deadline and confirmed that Highland's motion for summary disposition on the foreclosure claim would be heard the following Friday, November 3, 2006.

At the November 3, 2006 motion hearing, the trial court—citing its appreciation of the materials submitted by the parties, its familiarity with the issue, and its understanding of the position of the parties—granted summary disposition on Highland's foreclosure action and ordered Warren to pay Association fees of $9,624.15. The trial court also dismissed Warren's counter-claims with prejudice. The trial court held the motion for attorney fees in abeyance pending a further motion by Highland.

A motion hearing was held on November 17, 2006 to address the issue of attorney fees. Warren argued that Highland had violated discovery rules, that there was no legal basis for attorney fees, and that a full accounting should be performed before the trial court awarded attorney fees; the trial court indulged Warren and allowed her to make her arguments. Highland argued that Warren had not actually disputed any of the fees and that the trial court should award actual attorney fees of $19,242.85 based on the bylaw language. The trial court found that $19,242 "may be a little excessive" and awarded Highland $10,000 in attorney fees.

II. SUMMARY DISPOSITION

A. Standard of Review

Construing and applying a court rule presents a legal issue subject to de novo review. *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 133; 624 NW2d 197 (2000). A trial court's decision to deem requests admitted is reviewed for an abuse of discretion. See *Medbury v Walsh*, 190 Mich App 554, 556; 476 NW2d 470 (1991). If the trial court's decision falls within a range of reasonable and principled outcomes, then the trial court has not abused its discretion. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

On appeal, a trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). This Court reviews the record in the same manner as the trial court and considers the evidence in a light most favorable to the non-moving party. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993).

B. Analysis

1. Summary Disposition of Warren's Claims Based on Deemed Admissions

Warren's first contention, that the deemed admissions contained deliberately "false" information, lacks merit and has no legal justification. MCR 2.312(A) allows a party to seek "a written request for the admission of the truth of a matter . . . that relates to statements or opinions of fact or the application of law. . . ." Highland's requests for admissions were responsive to Warren's extensive complaint. The admissions were correlated to specific allegations in the complaint and were intended to cause Warren to deny the specific request for admission, admit the request for admission, or reveal the factual basis behind the allegation. If Warren believed the requests were untrue, she should have denied them in her answer as required under MCR 2.312(B)(2).

Warren next argues that the trial court erred by failing to determine whether her objections to the requests for admissions were sufficient. Conversely, Highland argues that Warren's objections were so patently insufficient that they served as refusals to comply with MCR 2.312. We agree with Highland. The trial court properly exercised its discretion when it found that Warren's responses were not objections at all, but were actually non-complying answers.

MCR 2.312(C) provides as follows:

> The party who has requested the admission may move to determine the sufficiency of the answer or objection. . . . Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of the rule, it may order either that the matter is admitted, or that an amended answer be served.

In this case, Warren had a long history of failure to comply with discovery and had demonstrated a willingness to take any action that would delay the case or obscure the facts. Warren failed to answer Highland's first interrogatories, and the trial court issued an order

compelling her to respond by February 17, 2006. When the hearing on Highland's motion to have its requests for admissions deemed admitted took place on April 7, 2006—nearly two months after the imposed deadline—Warren still had not complied with the trial court's order. By April 7, 2006, Warren had been served with two sets of interrogatories, requests for production of documents, and requests for admissions; the only request she responded to was the request for admissions, and that response included objections to every single request. She also filed a bankruptcy petition, which she knew would interrupt the foreclosure proceedings, and then allowed the bankruptcy action to be dismissed because she failed to meet statutory filing deadlines.

Many of the requests were seeking very basic factual admissions. For example, Warren was requested to admit that she received a copy of the bylaws, that she was aware that monthly Association assessments must be paid by co-owners, and that the Association may charge a delinquent co-owner a reasonable administrative fee. MCR 2.312(B)(2) requires that she answer either by admitting, denying, or explaining why she could not admit or deny. But Warren did not admit, deny, or explain; instead, she crafted a two-page, eight-paragraph response that she labeled as an objection. Warren did not raise any evidentiary objections; she did not indicate that the requests were improper, that they were beyond the scope of discovery, or that they were seeking privileged information. Instead, she objected to the "propriety of the requests for reasons explained in her Motion for a Protective Order." However, Warren requested adjournment of the hearing on the protective order motion the evening before it was to be held.

At the April 7, 2006 hearing, which was held on Highland's motion to deem its requests for admissions admitted, the trial court heard oral argument from Highland, from Warren's counsel, and from Warren. The trial court had also been provided with written briefs from both parties. Highland argued at the hearing, as it argues here, that Warren's responses were not objections within the intent and spirit of the court rule, but were instead insufficient answers. Highland then requested that the trial court grant one of the remedies available under MCR 2.312—either deem the requests admitted or order Warren to answer. Neither Warren nor her counsel offered any counter to this argument. They simply reaffirmed the first premise of Warren's response that she should not have to answer because she was planning to dismiss the claims without prejudice. This argument ignores that fact that, under MCR 2.504, Warren could not unilaterally dismiss the case—she would only be able to do so by stipulation of the parties or by court order. The trial court granted Highland's motion to deem the requests admitted. Under the circumstances of this case, Warren is not entitled to any presumption that her objections had any significance. *Traxler v Ford Motor Co*, 227 Mich App 276, 285; 576 NW2d 398 (1998).

Warren further argues that the trial court abused its discretion by granting summary disposition, in favor of Highland, on her claims. We disagree. At the June 16, 2006 hearing on Highland's motion for summary disposition Highland argued that no issue of material fact remained on any of Warren's claims; Highland met the burden of supporting its position by identifying the matters that had no factual issues and then by referencing the deemed admissions that had dispelled any question of material fact. MCR 2.116(G)(3)(b); MCR 2.116(G)(4); *Coblentz v Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006). Warren provided no evidence in opposition to Highland's argument; instead she argued that the trial court should not grant summary disposition because she was not represented by counsel, and then she attempted to re-argue facts that were no longer at issue because they had been deemed admitted. Warren failed

to meet her burden of showing that a genuine issue of disputed fact remained. *Coblentz*, *supra* at 569. A matter admitted is conclusively established unless the trial court permits the withdrawal or amendment of an admission. MCR 2.312(D)(1). The deemed admissions resulting from Warren's failure to answer sufficiently formed the basis for summary disposition. *Medbury*, *supra* at 556.

In addition, Warren argues that summary disposition was improper because she had no notice that the matter had been set for a hearing. However, the record indicates that Warren received notice when Highland first filed the motion in December of 2005; the motion was accompanied by a praecipe fixing a hearing date of February 24, 2006. She received further notice when the February hearing was adjourned to May 5, 2006. Warren was also present at the May 5, 2006 hearing, when the trial court adjourned the motion until June 16, 2006. In addition, Warren filed a response to Highland's motion for summary disposition on June 9, 2006. Clearly, Warren was apprised of the pendency of the action and had the opportunity to present objections. *Vicencio v Ramirez*, 211 Mich App 501, 504; 536 NW2d 280 (1995).

Finally, Warren's argument that the trial court abused its discretion by refusing to award her attorney fees is without merit. MCR 2.625(A)(1) allows costs to the prevailing party, but Warren's claims were summarily dismissed, with prejudice. Highland was the prevailing party because all of Warren's claims were dismissed. *Citizens Ins Co of America v Juno Lighting, Inc*, 247 Mich App 236, 246; 635 NW2d 379 (2001). To be considered the prevailing party Warren is required to show that she has improved her position, she has not done so; therefore, the trial court did not abuse its discretion in denying her costs. *Ullery v Sobie*, 196 Mich App 76, 82-83; 492 NW2d 739 (1992).

2. Summary Disposition of Warren's Counterclaims Based on Res Judicata

Warren's first argument, that Highland's foreclosure claim is barred by res judicata, is based on a gross misunderstanding of the facts. Warren argues that the trial court's order denying attorney fees to Highland, as part of the trial court's summary dismissal of her first case, applies to the attorney fees that form part of the debt that Highland is seeking to enforce through the foreclosure action. Even if true, the trial court's order only applied to the attorney fees that accrued as a result of defending against Warren's case. The record indicates that there are significant attorney fees related to the foreclosure action and to Highland's attempt to collect on Warren's persistent arrearages. Highland is entitled to collect the attorney fees that are unrelated to Warren's dismissed case. The foreclosure action to collect the unrelated attorney fees had not been litigated and was not barred. Further, even if all legal fees were excluded, there was still a significant co-owner assessment arrearage at issue that had not been litigated.

Warren's second argument similarly misstates the facts. The trial court did not grant summary dismissal of Warren's counterclaims based on the deemed admissions from the previous case; instead, it granted summary dismissal because the counterclaims were barred by res judicata. In addition, Warren fails to support her theory and the related factual statements with any references to the record. *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 388; 689 NW2d 145 (2004). Therefore, this issue is abandoned. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004).

Highland argues that Warren's counterclaims are barred by res judicata. We agree. Warren's answer to Highland's foreclosure complaint states that the counterclaims were "as pled in Case # 05-534209-CH." The claims in that case were all dismissed with prejudice and are thus barred in this subsequent action between the same parties because the facts and evidence essential to prove the issue were identical to the facts and evidence essential to the prior action. *Sewell v Clean Cut Mgt, Inc*, 463 Mich 569, 575; 621 NW2d 222 (2001).

Highland, as the party asserting the doctrine, bears the burden of establishing the applicability of res judicata. *Baraga County v State Tax Comm*, 466 Mich 264, 269; 645 NW2d 13 (2002). Highland argued before the trial court that Warren's counterclaims had all either been previously decided on the merits or could have been decided if they had been properly raised. The trial court agreed and granted summary judgment on Warren's counterclaims.

The elements of res judicata are well established in Michigan law as follows: (1) the judgment in the prior action was a decision on the merits; (2) the decree in the prior action was a final judgment; (3) the issues contested in the second case were, or could have been, resolved in the first; and (4) both actions involved the same parties. *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 418; 733 NW2d 755 (2007). In this case, all of the elements are satisfied. Warren's claims in the first case were dismissed by summary judgment; a summary judgment is a decision on the merits. *Roberts v City of Troy*, 170 Mich App 567, 577; 429 NW2d 206 (1988). The trial court's decision in the first case disposed of all of Warren's claims and adjudicated the rights of all of the parties on those claims. MCR 7.202(6)(a)(i). Six of Warren's counterclaims in the second case were identical to the claims in the first case, so the identical facts would support her counterclaims; therefore, the third res judicata requirement is met because the matters asserted in the second case were raised and resolved in the first case. *Washington*, *supra* at 420. Further, Warren's additional counterclaims, alleging breach of the bylaws and breach of an oral contract, arise from the same transaction as the claims in the first case and could have been raised in that case through the exercise of reasonable diligence. *Sewell*, *supra* at 575. All parties in the second case were also parties in the first case. The trial court did not abuse its discretion by granting summary dismissal of Warren's counterclaims because all of the counterclaims were barred by res judicata.

3. Summary Disposition of the Foreclosure Action

Warren first argues that Highland failed to answer Warren's counterclaims and therefore admitted the allegations therein. We disagree. The record shows that Highland answered Warren's counterclaim and her amended counterclaim in a responsive pleading and specifically admitted, denied, or left Warren to her proofs on every paragraph. Again, Warren has based her argument before this Court on a misstatement of the facts of the case.

Warren further argues that the trial court erred in granting summary disposition before the scheduled completion of discovery. We disagree. It is true that the trial court granted summary disposition before the discovery cut-off date, but the facts indicate that further discovery would have been futile. Both Warren and Highland provided briefs and made oral arguments at the summary disposition hearing. Highland provided affidavits and documentary evidence to support its position—Warren provided only a brief with no attached affidavits or documentary evidence. Warren's oral argument consisted of a reargument of the claims that had been dismissed with prejudice in her previous case; she then requested an extension of discovery

but offered no argument that further discovery would reveal any support for her position. *VanVorous v Burmeister*, 262 Mich App 467, 477; 687 NW2d 132 (2004). Highland argued the facts at issue: Warren was in violation of the condominium bylaws; Michigan condominium law and the bylaws provided that foreclosure was an appropriate remedy; and Warren's counterclaims were barred by res judicata. Warren did not demonstrate that any facts remained in dispute and did not indicate what, if any, facts would be determined by further discovery; therefore, summary disposition was not premature. *Id.*

Warren also argues that she is entitled to sanctions because Highland's counsel filed a false affidavit. Again, we disagree. The signature of an attorney constitutes a certification by the attorney as follows: (1) the attorney has read the document; (2) the attorney reasonably believes that the document is well grounded in fact; and (3) the document is not being offered for any improper purpose. MCR 2.114(D). Warren's argument is based on an assertion that the trial court's denial of attorney fees to both parties when her first case was dismissed operates as a bar to the recovery of attorney fees of any type and for any purpose. This assertion is clearly in error; the trial court's ruling addressed attorney fees and costs only as they were related to Warren's six-count case. The issue of whether Highland would be able to collect attorney fees on the foreclosure action was not before the trial court. There is no indication that the affidavit in question was signed by the attorney in violation of MCR 2.114, and no indication that it was proffered for any improper purpose. If there was no improper purpose, then Warren is not entitled to sanctions. *Kitchen v Kitchen*, 231 Mich App 15, 21; 585 NW2d 47 (1998).

Highland argues that the foreclosure action was not fully litigated between the two parties. We agree. Warren's first case, which she uses as the basis for her collateral estoppel and res judicata arguments, did not address Highland's right, available under the bylaws and Michigan condominium law, to foreclose on Warren's property to enforce the lien imposed because Warren was in violation of the bylaws. Highland recorded a lien against Warren's property on August 5, 2005, and when she failed to bring her account current, Highland scheduled a foreclosure sale by public auction for December 1, 2005. Warren filed for bankruptcy protection on December 1, 2005; Highland responded by dropping the foreclosure action because the bankruptcy petition created an automatic stay against any action Highland could take to enforce its lien against Warren's property. 11 USC 362(a)(5). Highland's foreclosure action was not before the trial court in Warren's first case against Highland. Warren cannot rely on collateral estoppel to prevent litigation of an issue that might have been litigated in a previous case but was not. *McCoy v Cooke*, 165 Mich App 662, 665-667; 419 NW2d 44 (1988).

Again, the party asserting the doctrine of res judicata bears the burden of establishing its applicability. *Baraga County*, *supra* at 269. Warren must show that there was a decision on the merits on the foreclosure claim in the previous case. *Washington*, *supra* at 418. Warren asserts that the foreclosure issue was fully pleaded in her first case against Highland; her complaint in that case, however, reveals otherwise. The complaint clearly states that Warren is challenging the validity of the lien interest and sets forth the particulars of the six separate claims in support of the challenge to the lien. Among her requests for relief, Warren asked the trial court to grant a temporary restraining order (TRO) prohibiting Highland from proceeding with the December 1, 2005 foreclosure sale. All six claims were dismissed with prejudice by the trial court and it neither considered the foreclosure issue nor issued the TRO. Therefore, Warren cannot show

that there was a decision on the merits on the foreclosure claim. *Id.* The trial court did not err in granting summary disposition on Highland's claims pursuant to MCR 2.116(C)(7)

III. ATTORNEY FEES

A. Standard of Review

The decision whether to award attorney fees and the determination of the reasonableness of the fees is within the trial court's discretion and is reviewed on appeal for an abuse of discretion. *Windemere Commons I Ass'n v O'Brien*, 269 Mich App 681, 682; 713 NW2d 814 (2006); *Farmers Ins Exch v Kurzmann*, 257 Mich App 412, 422; 668 NW2d 199 (2003). As stated above, if the trial court's decision falls within a range of reasonable and principled outcomes, then the trial court has not abused its discretion. *Maldonado*, *supra* at 388. Statutory interpretation is a question of law that this Court reviews de novo. *Reed v Yackell*, 473 Mich 520, 528; 703 NW2d 1 (2005).

B. Analysis

1. Reasonable Fees Under MCL 559.206

Warren argues that the trial court did not allow her to challenge the attorney fees, so it should not have granted any fees. We disagree. Warren was given the opportunity to challenge the attorney fees; in fact, she was allowed to argue at length but she chose not to challenge the reasonableness of the attorney fees. Instead, she repeated arguments that were barred by res judicata or had been rendered irrelevant by the trial court's summary disposition in favor of Highland.

Highland's argument is rooted in the premise that the mandatory language of the bylaws trumps the statutory language. The bylaws state that "expenses incurred . . . including . . . actual attorneys' fees (not limited to statutory fees) . . . shall be chargeable to the co-owner in default and shall be secured by the lien on his apartment." Highland asserts that the bylaws' use of "shall" mandates the awarding of actual fees incurred and precludes the trial court from making a reasonableness inquiry. This assertion emphasizes some language in the statute to the exclusion of other language. We disagree.

MCL 559.206 provides as follows:

> A default by a co-owner shall entitle the association of co-owners to the following relief:
>
> ***
>
> (b) In a proceeding arising because of an alleged default by a co-owner, the association of co-owners or the co-owner, if successful, shall recover the costs of the proceeding and reasonable attorney fees, as determined by the court, to the extent the condominium documents expressly so provide.

Highland's emphasis on the final phrase of §559.206(b) renders the earlier language, concerning reasonable attorney fees as determined by the trial court, to be nugatory; this Court should avoid an interpretation that would create such as result. *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). Highland's position is that the final phrase, in conjunction with the language of the bylaws, overrides the reasonableness language. To accept Highland's position, this Court would have to find that the Legislature intended to allow condominium document writers the ability to avoid judicial scrutiny of attorney fees simply by including the phrase "actual attorney fees" in the documents. The language of the statute does not support such a finding; if the Legislature had intended to take away the trial court's discretion on attorney fees, it would have left out the reasonableness language. *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 219; 731 NW2d 41 (2007). The mandatory language of the bylaws does not override the statutory language; instead, it creates a conflict between the bylaws and the statute.

A contract that conflicts with a statute is void as against public policy, so it should be construed, if possible, in a way that is in harmony with the statute. *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 599; 648 NW2d 591 (2002). The trial court had copies of the bylaws and was aware of the mandatory language. In addition, counsel argued that the bylaws, in conjunction with the statute, entitled Highland to actual attorney fees. There is no indication in the record that the trial court consciously considered whether a conflict existed but it clearly did not ignore the requirements of § 559.206; in fact, it specifically noted that Highland was "entitled to reasonable attorney fees pursuant to the Condominium Act." After making that statement, the trial court noted that it had gone over the submitted expenses and then it awarded attorney fees of $10,000. Thus, the trial court can be understood to have construed the bylaws language to mean "actual attorney fees (as deemed reasonable by the court)," which renders the bylaws compatible with current public policy as reflected by § 559.206(b). *Cruz*, *supra* at 599.

Highland also argues that this Court has upheld an award of actual attorney fees as provided by contract language. Highland relies on an unpublished opinion holding that a successful plaintiff, who sued for breach of a commercial lease, should have been awarded actual attorney fees as provided by the lease language. *Cargas v Bednarsh*, unpublished memorandum opinion of the Court of Appeals, issued July 24, 2003 (Docket No. 239421), remanded on other grounds, 473 Mich 86 (2005). First, unpublished opinions have no precedential value. MCR 7.215(C)(1). But even if published, this case is distinguishable from the present case. *Cargas* involves a contract (a commercial lease) between two parties, but it does not involve any conflict, or potential conflict, between the contract and a statute. Unlike this case, *Cargas* is a simple case of contract interpretation; for that reason, it has no persuasive value here. The trial court did not err in its interpretation of § 559.206(b). Further, the trial court's decision to make a reasonableness determination, rather than award actual attorney fees, fell within a range of principled outcomes and was not an abuse of discretion.

2. Attorney Fee Award

Both parties are appealing the award of attorney fees. Warren appeals the award as being too high and argues that they are unreasonable by any standard; however, Warren offers no supporting law or policy for this argument. Each argument must be supported by citation to appropriate authority or policy; therefore, Warren's argument is abandoned. MCR 7.212(C)(7); *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003). Highland

appeals the award as being too low and argues that the trial court abused its discretion by failing to consider the necessary factors in seeking to determine whether the requested fees were reasonable. We disagree.

Generally, if the reasonableness of an attorney fee request is challenged, the trial court should conduct an evidentiary hearing. *Miller v Meijer, Inc*, 219 Mich App 476, 479; 556 NW2d 890 (1996). However, if the parties have presented sufficient evidence that will allow the trial court to determine the amount of attorney fees, then an evidentiary hearing is not required. *John J Fannon Co v Fannon Products, LLC*, 269 Mich App 162, 171; 712 NW2d 731 (2005). In any case, the trial court must make a determination as to whether the requested fees are reasonable. *B & B Investment Group v Gitler*, 229 Mich App 1, 16; 581 NW2d 17 (1998). There is no precise formula for determining the reasonableness of attorney fees, but the trial court should consider a list of factors as follows:

> (1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client. [*Wood v DAIIE*, 413 Mich 573, 588; 321 NW2d 653 (1982) (citation omitted)].

The trial court is not required to make a detailed accounting of its consideration of each factor, but it must make some finding of fact. *B & B Investment Group*, *supra* at 16.

Warren requested that the trial court hold an evidentiary hearing on the issue of attorney fees, theorizing that there would be insufficient time to adequately address the issue on "motion day." However, neither party has raised the issue of whether the trial court should have held an evidentiary hearing. In this case, the record contains voluminous evidence of the basis for Highland's attorney fees and costs, which allowed the trial court to determine if the requested attorney fees were reasonable, so an evidentiary hearing was not required. *John J Fannon Co*, *supra* at 171. Billing statements that covered the period from June 7, 2005 through November 17, 2006, were entered as evidence. The statements included itemized monthly slip listings of the services provided, the hours billed in tenths of hour increments, and the hourly rate. In addition, the slip listing included a number of items that were billed at flat rates. Attorney services were billed at the rate of $175 per hour. Further, the billing statements were provided to Warren, which provided her with the opportunity to challenge the fees during the November 17, 2006 motion hearing. The trial court's failure to hold an evidentiary hearing was not an abuse of discretion.

The trial court is not required to give itemized or detailed findings regarding the factors to be considered when determining whether attorney fees are reasonable. *In re Attorney Fees and Costs*, 233 Mich App 694, 705; 593 NW2d 589 (1999). Highland questions whether the trial court considered the factors at all in determining whether the attorney fees were reasonable. In fact, the trial court did not create any record of how it reached its decision on the amount of attorney fees to award. The trial court's only commentary on the record is the statement that "under the circumstances" the amount requested "might be a little excessive." This statement gives some credence to Highland's argument that the trial court considered only one of the factors—the amount in question and the result achieved—in reaching its decision.

This Court has remanded an award of attorney fees when the trial court failed to show on the record that it had considered any of the factors in its award of attorney fees. *Petterman v Haverhill Farms, Inc*, 125 Mich App 30, 32; 335 NW2d 710 (1983). Conversely, this Court has refused to remand when the trial court made findings of fact on the record, even though the findings were not specifically stated in conjunction with the reasonableness factors. *Taylor v Currie*, __ Mich App __; __ NW2d __ (Docket No. 269684, issued 10/25/07), slip op p 8. In this case, much like in *Taylor*, the trial court had ample evidence to make findings of fact as to the reasonableness of the requested attorney fees; but unlike *Taylor*, in this case, the trial court made no such findings. In *Taylor*, the trial court made findings of fact concerning the taxed party's behavior, and how that behavior led to the attorney fees that were being requested; it also addressed the hourly rate charged by the prevailing party's attorney, and found the rate to be reasonable. In this case, the trial court indicated that it had reviewed the scheduled listing of expenses and stated that it had some questions about the listings, and then it awarded $10,000 of the $19,242 that was requested. It made no findings of fact and it did not address the reasonableness factors. In the absence of sufficient evidence in the record, this Court could find that the trial court's failure to create a record that it considered the reasonableness of the requested attorney fees rises to the level of an abuse of discretion. *Petterman, supra* at 712.

In this case, however, there is sufficient evidence in the record to determine whether the trial court abused its discretion. The record includes attorney billing statements and an itemized record of Warren's co-owner account. The first assessment of legal fees to Warren's account are dated June 8, 2005, and Highland filed the foreclosure action on April 7, 2006. Highland did not explain, in its motion brief or at oral argument, how the trial court should differentiate legal fees that arose in the first case (and were specifically denied by the trial court) from those that arose in the foreclosure action. The legal fees that were assessed against Warren from June 8, 2005 through April 2008 totaled $9,396.85; Highland requested $19,242. Although the trial court does not indicate how it reached the $10,000.00 award, excluding the pre-foreclosure attorney fees from the requested amount would result in an award of $9,845.15. Based on the evidence in the record, the award of $10,000.00, despite the failure of the trial court to make findings of fact, is not an abuse of discretion. *Maldonado, supra* at 476.

Affirmed.

/s/ Bill Schuette
/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher